timely manner.[174]

71. The Commission's benchmarks policy has provided a means to jump start reductions in settlement rates. The Commission stated in the *NPRM* that bilateral settlement rates on many routes are lower as a result of this policy, combined with other factors such as the effect of least-cost routing mechanisms such as refile and re-origination.[175] Currently, more than 94 percent of the approximately 35 billion outbound U.S.-international minutes, representing at least 173 of the 203 countries with which U.S. carriers correspond, are being settled at or below the relevant benchmark rate.[176] Even before the January 1, 2003 compliance date for the last group of benchmarks in the five-year period established by the *Benchmarks Order*, U.S. carriers had negotiated benchmark-compliant rates on more than three quarters of U.S.-international routes. We believe that these results have benefited U.S. customers.

72. We disagree with the assertions of some commenters that settlement rate reductions are not being passed on to U.S. customers, and we reject these commenters' inference that the benchmarks policy should therefore be rescinded.[177] Both statistical data collected by the Commission and economic theory indicate that reductions in settlement rates are being passed on to U.S. customers. Statistics collected from the Commission's annual report *International Telecommunications Data* (Section 43.61 reports from U.S. carriers) show that from 1997 to 2002, the average settlement rate for all U.S.-outbound traffic fell from $0.35 to $0.11, a decrease of $0.24, while the average price of a U.S.-international calling minute fell from $0.67 to $0.27, a decrease of $0.40.[178] Thus, average price reductions substantially outpaced settlement rate reductions during this period, reflecting pass-through of settlement rate reductions as well as other cost savings and increasing competition in the U.S.-international market.[179]

73. The data showing that settlement rates have been passed on to customers are consistent with economic theory. Settlement rates are a per-minute cost of providing international service and are therefore, in the terminology of economics, a "marginal cost." Basic economic theory teaches that, in a competitive market, changes in the marginal cost of a product are reflected fully in its price, and are therefore "passed on" to customers. Thus, because U.S.-international telecommunications carriers face robust competition in most markets, it is not

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174 *Benchmarks Order*, 12 FCC Rcd at 19862, ¶ 114

175 *NPRM*, 17 FCC Rcd at 19966, ¶ 18.

176 *See Section 43.61 data* We note that 30 routes remain out of compliance with our benchmarks policy even though our final transition deadline has passed.

177 AHCIET Comments at 4-7; Telefonica Comments at 5-7

178 *See* Appendix G.

179 Settlement rates are the single largest and most variable component of the marginal cost of international service We would expect changes in the price of U S international service to reflect changes in settlement rates first and foremost, and secondarily other effects, such as decreases in the marginal costs of other inputs as well as increases in productivity and the degree of competition in the provision of U.S. international services. These additional factors likely account for the fact that prices have decreased by somewhat more than the reduction in settlement rates, as demonstrated by the data. Some believe that net settlement rates are a more accurate gage of costs than settlement rates In the period from 1997-2002, net settlement rates declined by $0.16 per minute (from $0 25 per minute to $0.09 per minute) Thus calling rate reductions exceeded reductions in net settlement rates by an even greater amount than they exceeded reductions in settlement rates.

surprising that changes in settlement rates have been passed on to end-users in the United States.[180]

2. Elimination or Modification of Current Benchmarks

74. The parties that seek elimination of the benchmarks policy raise issues previously considered by this Commission and the courts. They generally characterize the policy as unilateral, extraterritorial regulation that is inconsistent with international agreements and international comity.[181] The Commission has previously held, and the courts have confirmed, that the Commission has jurisdiction to adopt settlement rate benchmarks for U.S. carriers, under the Communications Act and relevant case law. The Commission determined that above-cost settlement rates paid by U.S. carriers to terminate international traffic are neither just nor reasonable, and it acted pursuant to its statutory authority in Section 201(b) of the Communications Act to prohibit U.S. carriers from continuing to pay such charges.[182] The Commission also concluded in the *Benchmarks Order* that its benchmarks are consistent with international obligations of the United States, and do not violate international comity.[183] Furthermore, the Commission made it clear that it does not, through its benchmarks, assert extra-territorial regulation over foreign carriers because benchmarks are a constraint on U.S. carriers only.[184] Moreover, as explained in the *Benchmarks Order*, the policy is fully consistent with U.S. trade obligations under the GATS.[185] The D.C. Circuit Court affirmed the Commission's *Benchmarks Order* in these respects.[186] Nothing presented on the record in this proceeding persuades us to change our previous findings on these issues.

75. AT&T argues that the Commission should not eliminate benchmarks or adopt a sunset date for the benchmarks policy, as it would encourage non-compliance and "backsliding" by some carriers.[187] AT&T contends that the benchmarks remain necessary to obtain lower rates

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[180] The passing on of settlement rates to U.S. customers has not been uniform. Some basic rate and "casual calling" customers, who account for a relatively small portion of U.S. international traffic, have seen substantial rate increases since 1997. This outcome appears to be due to consumer information problems rather than lack of competition. Beginning in 2001, the FCC has undertaken a consumer education initiative to improve consumers' awareness of the availability of economical international calling plans. For further information on this effort *see* "Consumer Education Initiative for U.S. International Calling" at www.fcc.gov/ib.

[181] AHCIET Comments at 12; ASETA Comments at 1-2; EU Comments at 1-2, Government of Japan Comments at 1-2; Telefonica Comments at 11-12; CANTO Jan. 16, 2004 *Ex Parte* Letter at 1-2.

[182] *Benchmarks Order*, 12 FCC Rcd at 19932-39, ¶¶ 276-86

[183] *Benchmarks Order*, 12 FCC Rcd at 19949-52, ¶¶ 309-14; aff'd on recon, 14 FCC Rcd at 9260-9264, ¶¶ 12-24

[184] *Benchmarks Order*, 12 FCC Rcd at 19949-52, ¶¶ 309-14.

[185] *Benchmarks Order*, 12 FCC Rcd at 19924-28, ¶¶ 260-67.

[186] *See, e g., Cable & Wireless v FCC*, 166 F.3d 1224 (D.C. Cir. 1999). The D.C. Circuit rejected the argument that the benchmarks policy unlawfully asserts regulatory authority over foreign telecommunications services and foreign carriers. The court noted that "the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences." The court thus found the *Benchmarks Order* "does not regulate foreign carriers or foreign telecommunications services and therefore does not violate the Communications Act." *Id.* at 1230

[187] AT&T Comments at 27. AT&T notes that termination rates can fluctuate in either direction over time. The prospect of the removal of the Benchmarks Policy from U.S.-international routes, AT&T argues, would

(continued....)

in less developed, noncompetitive markets, and U.S. carriers continue to negotiate with foreign carriers to achieve benchmark rates in many markets.[188] MCI expresses concern that certain governments and carriers have recently attempted to raise unilaterally rates to above-cost levels and emphasizes that elimination of the benchmarks would send an erroneous signal to foreign governments and carriers that seek to raise settlement rates above current levels.[189]

76. The *Benchmarks Policy* has contributed to the decline in settlement rates on many U.S.-international routes. The value of these benchmarks is not, however, spent. Thirty routes, some with significant traffic volume, are still above benchmark rates.[190] Any prospect that benchmarks would be removed in the future could encourage intransigence by carriers in countries that have not yet agreed to benchmarks and may encourage carriers in currently benchmark-compliant countries to raise rates. In addition, in this Order, we rely on benchmarks as the trigger for the significant deregulatory step of removing the ISP from routes. Elimination or sunset of the benchmarks policy would remove the necessary prompt to implement this step, and would therefore invalidate its deregulatory nature. We therefore believe that elimination or sunset of the benchmarks policy at this time would not be in the public interest as this could prevent benchmarks from continuing to play a role in reducing settlement rates toward cost.

77. Finally, in the *Benchmarks Order*, the Commission set forth two limited exceptions to enforcement of the benchmark rate and the transition deadlines for a particular route.[191] First, any interested party may ask the Commission to reconsider rates on the grounds that they do not permit the recovery of total service long run incremental costs incurred to receive, transmit, and terminate international service.[192] Second, a U.S. carrier can request additional transition time for a route if annual reductions in settlement rates would entail a loss of greater than 20 percent of a country's annual telecom revenues.[193] In the *NPRM*, the Commission asked whether the Commission should consider modifying the policy to add further exceptions, including a "*de minimis*" exception, to its *Benchmarks Policy* based on the volume of minutes on a certain route, net settlement payments on a certain route, or other factors such that enforcing the benchmarks rate would be counterproductive from a telecommunications policy perspective, as well as an economic and foreign policy perspective.[194] Although we received no

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encourage further intransigence by countries that have not yet agreed to benchmark rates and encourage new efforts to raise rates. AT&T Comments at 29.

188 AT&T Comments at 29. AT&T further notes that certain parties who opposed the Commission's *Benchmarks Policy* when it was first adopted, now support its role in lowering termination rates closer to cost. AT&T Reply at 16-17 (noting C&W and Telecom Italia's support of benchmarks in this proceeding.)

189 MCI Reply at 10. MCI therefore asserts that it would be premature for the Commission to eliminate the policy as it remains an important part of negotiating settlement arrangements with foreign carriers. MCI Reply at 10 *See also* AT&T Comments at 29

190 *See* Appendix F.

191 *Benchmarks Order*, 12 FCC Rcd at 19842-43 & 19888-89, ¶¶ 74 & 174.

192 *Benchmarks Order*, 12 FCC Rcd at 19842-43, ¶ 74.

193 *Benchmarks Order*, 12 FCC Rcd at 19888-89, ¶ 174.

194 *NPRM*, 17 FCC Rcd at 19978, ¶ 44 The Commission also requested comment on what sub-factors should be considered in making a determination as to whether a route was "*de minimis* " *Id.*

formal comment on this issue,[195] CANTO did address it in its *ex parte* submission.[196] CANTO requests that the Commission consider creating exemptions from benchmarks for insular foreign carriers in high-cost countries.[197] CANTO argues that the Commission should treat foreign carriers under the benchmarks regime in a manner consistent with domestic regimes applicable to high-cost providers of telecommunications services.[198] Based on the record before us, we do not adopt any further exceptions to the benchmarks policy. We would consider changes in our current benchmarks exception standard, however, but only pursuant to a petition for rulemaking that offered specific proposals that affords other parties an opportunity for comment.

3. Future of Benchmarks

78. Several parties recommend that we commence a new proceeding to establish new, lower benchmarks based on current data.[199] AT&T argues that, since the current benchmarks are much further above cost than they were when originally adopted because international termination costs have declined, they are becoming less effective than they were originally in achieving the Commission's goal of cost-based rates.[200] AT&T emphasizes the need for a new round of benchmarks, noting that existing benchmarks are so out of date that foreign carriers and governments are increasingly citing them as justification for increasing, rather than lowering, their rates.[201] Telecom Italia urges that benchmarks should be updated to reflect the decline in settlement rates over the last few years.[202] MCI argues that benchmarks continue to serve an important purpose as a "ceiling" for U.S. carriers' settlement rate negotiations because any settlement rate that exceeds the relevant benchmark constitutes an unjust and unreasonable

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195 C&W addressed the "*de minimis* issue" broadly in the context of the Commission's International Simple Resale (ISR) Policy. C&W Comments at 15-16. C&W notes that "low-volume routes" have been characterized as "*de minimis*" by the Commission in other contexts. C&W Comments at 16 (citing *In the Matter of the Merger of MCI Communications Corp and British Telecommunications plc*, 12 FCC Rcd 15351, 15463-64, ¶¶ 290-91 (1997) and *In the Matter of Motion of AT&T Corp to be Declared Non-Dominant for International Service*, 11 FCC Rcd 17963, 17998-99, ¶¶ 94-97 (1996) (where the Commission decided to forbear application of its dominant carrier regulations due to the *de minimis* U.S. billed minutes on certain routes). C&W also notes that, regardless of whether the Commission classified certain routes as "*de minimis*" it would retain its traditional enforcement powers. C&W Comments at 16.

196 CANTO Jan. 16, 2004 *Ex Parte* Letter at 7-8.

197 CANTO Jan. 16, 2004 *Ex Parte* Letter at 8.

198 CANTO Jan. 16, 2004 *Ex Parte* Letter at 8

199 AT&T Comments at 26-30; Telecom Italia Comments at 5; MCI Reply at 10-11. *see also* NTIA Aug 5, 2003 *Ex Parte* Letter at 2 (encouraging the Commission to "investigate the feasibility and practicality of downward revisions to the existing benchmarks").

200 AT&T Oct 22, 2003 *Ex Parte* Letter at 6.

201 AT&T Reply at 16. We also note that AT&T filed an *ex parte* letter in this proceeding broadly discussing ISP reform. AT&T Oct. 22, 2003 *Ex Parte* Letter at 1. AT&T argues that while there is broad support for the continuation of the *Benchmarks Policy*, the benchmarks themselves "no longer adequately serve the Commission['s] objective of Cost based rates." AT&T Oct. 22, 2003 *Ex Parte* Letter at 6. AT&T asserts that the current benchmarks are based on 1996 data and that the average U.S. settlement rate is below the lowest benchmark rate. *Id*

202 Telecom Italia Comments at 5.

charge or practice under Section 201 of the Telecommunications Act.[203] MCI recommends that the Commission initiate a new proceeding so that benchmarks can be revised to reflect cost-based rates, as well as rate reductions that have already occurred in the marketplace since the *Benchmarks Order* was adopted.[204]

79. Sprint proposes more limited changes to benchmarks. Sprint identifies attempts by foreign governments to mandate price floors above prevailing, commercially established termination rates as the most dangerous threat to competition in international termination markets.[205] It agrees that benchmark rates are outdated and considerably above actual cost-based rates.[206] Sprint believes that the institutionalization of above-cost benchmarks harms U.S. customers by allowing foreign governments to justify increases in settlement rates as reasonable to the extent that the rates remain below the Commission's benchmarks,[207] and also allows U.S. affiliates of foreign carriers to engage in anticompetitive behavior.[208] Sprint argues, however, that a major, long-term undertaking to revise benchmarks would be unnecessary, and advises the Commission to limit recalculations of benchmarks to routes on which rates are not "low" or to routes for which a foreign government attempts to mandate rate increases.[209]

80. Two parties recommend that we maintain our current benchmarks policy, including current benchmark rate levels, as a safeguard against persistent market power that exists in many foreign markets.[210] One asserts that revision of benchmark rates is unnecessary in light of the continuing decline in settlement rates,[211] and also argues that downward revision of benchmarks could result in retaliatory action on the part of foreign national regulatory authorities.[212]

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203 *See Benchmarks Order*, 12 FCC Rcd at 19939, ¶ 286, *Cable & Wireless v FCC*, 166 F 3d at 1231 (D.C. Cir 1999).

204 MCI Reply at 11.

205 Sprint Comments at 2, 5. Sprint cites the Dominican Republic, China, and the Philippines as examples. Sprint Comments at 5-6.

206 Sprint Comments at 6-7 According to Sprint, evidence from U.S. spot markets for international termination services and from studies undertaken by the New Zealand's Commerce Commission and the European Union show that the FCC's benchmark rates are far above the actual cost of international termination, which Sprint implies is only a few pennies. Sprint Comments at 7-9.

207 Sprint Comments at 2, 6, & 10.

208 Sprint Comments at 10-11. Such behavior would include, *e.g.*, price-squeezes. *See Benchmark Order*, 12 FCC Rcd at 19902, ¶ 211.

209 Sprint Comments at 2, 15. Sprint defines rates as "low" if they are close to costs, as indicated, *e.g.*, by the presence of spot market rates that are 75% below benchmarks for "commercially meaningful volumes" or the average of some basket of rates on routes where "vibrant competition" is acknowledged to exist, *e.g.*, those routes from which the ISP is currently lifted. Sprint Comments at 13. Additionally, Sprint states that the tariff components pricing (TCP) model used by the Commission in establishing benchmarks remains a useful model for updating benchmark rates, but also urges the Commission to consider other types of potentially useful cost information that have come to light since the original benchmarks proceeding, such as spot market data and information from other studies Sprint Comments at 16.

210 C&W Comments at 17; Verizon Comments at 6-7.

211 Verizon Comments at 6-7.

212 Verizon Reply at 3-4

81. CANTO opposes Commission initiation of a new proceeding to modify the benchmark policy, noting that some of the revenue reductions imposed as a result of the policy are only being recently implemented.[213] CANTO urges the Commission to permit marketplace and technological forces, as well as multilateral institutions and national regulatory authorities, to address foreign termination rate issues. If the Commission does initiate a proceeding, CANTO urges it to consider several factors.[214] Additionally, VSNL filed an *ex parte* submission in this proceeding requesting that, if the Commission should move forward with a further proceeding regarding the benchmarks policy, it should take into account that National Regulatory Authorities (NRAs) in some countries prescribe specific per-minute interconnection-related charges.[215]

82. While we conclude that our benchmarks policy continues to play an important role in driving rates toward costs and should not be eliminated, we do not now conclude that we should initiate a new proceeding to revise benchmarks downward. Section 43.61 data shows that the average settlement rate declined to $0.11 per minute in 2002.[216] This decline is significant and has taken place within a relatively short period of time. In 1997 the average settlement rate was $0.35 per minute—well above the highest benchmark rate of $0.23 established that year in the Commission's *Benchmark Order*. By 2001, the average settlement rate was $0.14 per minute—below the lowest benchmark rate of $0.15 that the Commission established in 1997.[217] This decline appears to be the result of both the Commission's benchmarks policy and the emergence of new market institutions that are developing, such as spot markets, where a U.S. carrier can choose the lowest rate available for routing traffic to the destination country. In addition, use of VoIP rather than voice grade IMTS circuits is making available means of routing traffic at lower-cost options.[218]

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213 CANTO Jan. 16, 2004 *Ex Parte* Letter at 1.

214 These factors include (1) maintaining consistency with the WTO Basic Telecommunications Agreement and the Reference Paper; (2) sufficiency of Commission authority to prescribe rates that may be inconsistent with the laws, regulations or policies of other countries; (3) adopting broader policy goals beyond reducing rates such as improvement of the quality of international telecommunications services; (4) conducting a *de novo* examination of long run incremental cost (LRIC) methodology as the proper method for measuring "just and reasonable rates"; (5) reliance upon commercial negotiations rather than regulatory intervention; (6) recognizing potential for foreign carriers to terminate services with U.S. carriers and disrupt traffic rather that comply with lowered benchmark rates; (7) analyzing issues related to establishment of new benchmarks using the TCP model; and (8) assuring that U.S. carriers pass through cost reductions to all classes of U.S. callers in the form of lower calling rates on a route-by-route basis. *See* CANTO Jan. 16, 2004 *Ex Parte* Letter at 1-9.

215 According to VSNL, in some cases, these charges relate to access deficit charges (ADC's) intended to defray certain regulatory obligations such as universal service requirements in the foreign termination country. VSNL notes that these charges are passed on to carriers, such as VSNL, that terminate international traffic in certain countries, but do not operate local telephone networks in that country VSNL argues that any model adopted by the Commission under a revised benchmarks policy should reflect these costs. *See* Letter from Robert Aamoth, Counsel, Videsh Sanchar Nigam Limited, to Marlene Dortch, Secretary, FCC, IB Docket 02-324, 96-261 at 1-2 (dated Jan. 20, 2004) (VNSL Jan. 20, 2004 *Ex Parte* Letter.)

216 All calculations of average settlement rates in this section are weighted averages by minutes.

217 *See* Appendix G.

218 The recent OECD study on trends in international calling prices in OECD countries provides anecdotal information on the development of IP-based networks. The study observed that, "since the cost for transmission of voice data over IP-based networks is much lower than the cost of transmission over the PSTN [public switched network] IP telephony services have been launched with much lower fees than PSTN telephony services and they

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83. We recognize, however, that there remains concern about the impact of above-cost accounting rates on U.S. customers. First, a rate of $0.11 per minute may be substantially above cost. In the *Benchmarks Order*, the Commission estimated that the actual cost of terminating international traffic in 1997 was approximately $0.06-$0.09 per minute.[219] AT&T argues that a revised TCP study would result in benchmarks at approximately $0.03-$0.04 per minute for fixed lines and approximately $0.06-0.08 per minute for mobile termination.[220] AT&T also states that wholesale rates of $0.02-$0.03 per minute, which AT&T implies are compensatory, are available on many routes.[221] AT&T and Sprint cite a variety of cost studies indicating that the actual cost of international termination services is a few pennies at most.[222] Given the fact that U.S. customers made approximately 34 billion minutes of international calls in 2002, every penny by which the average settlement rate is above cost amounts to approximately $340 million in end-user overcharges annually. In other words, a difference of as little as $0.03 between the average rate and the actual cost amounts to over $1 billion annually

84. Second, settlement rates on many routes are above the average settlement rate of 10.65 cents per minute, some substantially so. Analysis of the Section 43.61 data for 2002 shows that 50 countries (comprising 20.454 billion minutes) had settlement rates below 10.65 cents per minute. The average settlement rate for these countries was 6.5 cents per minute. On the other hand, 153 countries (comprising 14.351 billion minutes) had settlement rates above 10.65 cents. The average settlement rate for these countries was 16.5 cents, substantially above any likely estimate of the per-minute cost of international termination services. Moreover, thirty routes are not yet in compliance with our benchmarks. Our analysis shows that substantial volumes of U.S. traffic are likely being settled at rates substantially above cost.

85. Taking these factors and the record of this proceeding into account, we will not at this time initiate a new proceeding to revise benchmarks down toward cost. We have found that the international market is subject to continuing change. Given the declines in settlement rates from 1997 to the present, it appears that the international marketplace has adjusted well to lower rates and could support further reductions to cost without experiencing economic hardship. Our action today in lifting the ISP from benchmark-compliant routes is intended to give U.S. carriers commercial flexibility to take advantage of a changing market. Indeed, it is unclear the extent to which the traditional pattern by which carriers originate and terminate calls under settlement arrangements remains the primary means of routing traffic. We believe that we should continue to review these developments, and further evaluate the record before us in deciding whether further action is necessary or would be effective in bringing settlement rates closer to cost.[223]

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become big competitors against PSTN telephony services." *OECD Trends Report* at 29 The study found that the primary benefit attracting use of IP Telephony networks is lower costs The study concluded that PSTN carriers are increasingly being driven by competition to offer IP telephony services and that carriers in some OECD countries are establishing their own international IP services. *OECD Trends Report* at 30.

219 *Benchmarks Order*, 12 FCC Rcd at 19823, 19864 & 19870, ¶¶ 37, 122 & 134.

220 *See, e g* , AT&T October 22, 2003 *Ex Parte* Letter at 9-18.

221 AT&T Reply at 19

222 AT&T Reply at 19; Sprint Comments at 7-9.

223 AT&T submitted a Revised Tariff Component Price (R-TCP) study of network components used to terminate international calls at a late date in this proceeding. *See* Letter from Douglas Schoenberger, Counsel, AT&T to Marlene Dortch, Secretary, FCC IB Docket No. 02-234, 96-261 (dated Feb. 5, 2004) (AT&T Feb. 5, 2004 (continued ...)

We, of course, retain the option to react to specific situations where we find that market failures occur, as discussed above. We welcome information from U.S. carriers as we further evaluate changing market developments and will reconsider our decision not to initiate a new benchmarks proceeding if such information so warrants. Carriers and other parties are free to make appropriate filings with the Commission requesting policy changes via petitions for rulemaking or other regulatory actions that they may believe are necessary. Carriers and other parties may also petition the Commission for a declaratory ruling that particular settlement rates, while below benchmarks, are unjust and unreasonable because they are well above costs.

VI. FOREIGN MOBILE TERMINATION RATES

A. Background

86. In addition to continuing concerns about above-cost accounting rates, the Commission expressed concern in the *NPRM* about rates associated with the termination of U.S.-international traffic on foreign mobile networks.[224] Over the past few years since the Commission completed its benchmarks proceeding, there has been a dramatic increase in the use of mobile telephony.[225] As the Commission explained in the *NPRM,* the cost of fixed-to-wireless calls in many countries, unlike in the United States, is borne by the originating or fixed-line customer (known as a "calling party pays" payment flow regime). When fixed-line U.S. customers call foreign mobile customers, foreign carriers often pass through the cost of mobile termination to U.S. carriers and customers.

87. In most cases, U.S. carriers do not have direct relationships with foreign mobile providers, but instead, U.S. carriers negotiate for mobile termination through the foreign fixed carrier. Therefore, these rates contain both a fixed and mobile network component. In some markets, foreign regulatory authorities have mandated specific rate floors or rate increases for foreign mobile termination. As a result, some U.S.-international carriers have suggested to the Commission that the wholesale rates for termination of international calls on foreign mobile networks are significantly in excess of cost and the Commission's benchmark rates established for termination of U.S.-international calls in the 1997 *Benchmarks Order*. These claims suggest that the increasing volume of mobile telephony in combination with high foreign mobile termination rates may be eroding the benefits of lower international termination rates and calling prices for U.S. customers.

88. In the *NPRM,* the Commission inquired whether foreign carriers may be exercising market power to the detriment of U.S. consumers and competition in their pricing of termination services on foreign mobile networks.[226] The Commission noted the increasing concern about the issue among foreign regulatory authorities, as foreign mobile services and the number of international calls terminating on mobile networks continue to grow.[227] As the result

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Ex Parte Letter) The Commission will require further opportunity to evaluate this study and any other information that parties may provide.

224 *NPRM*, 17 FCC Rcd at 19979-981, ¶¶ 45-51.

225 *NPRM*, 17 FCC Rcd at 19980, ¶ 48.

226 *NPRM*, 17 FCC Rcd at 19981, ¶ 51.

227 *NPRM*, 17 FCC Rcd at 19980, ¶ 50.

of different regulatory frameworks governing payments among countries for originating and terminating calls on mobile phones, the Commission also expressed concern that U.S. consumers originating international calls may be unaware they are calling mobile numbers or unaware of that they incur surcharges associated with the cost of terminating U.S.-international calls on foreign mobile phones.[228]

B. Discussion

89. In response to the *NPRM*, commenters raised several issues related to the Commission's concern regarding foreign mobile termination rates. These issues include: (1) the relevant cost structure and flow through of foreign mobile termination;[229] (2) the specific application of the 1997 benchmarks policy to foreign mobile termination rates;[230] (3) the Commission's jurisdiction in light of international law;[231] (4) the appropriate level of deference due by the Commission to ongoing proceedings in other fora such as national regulatory bodies and multilateral bodies;[232] and (5) the value of Commission consumer alerts.[233]

90. Many of the commenters argue that mobile termination rates appear to be

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[228] *NPRM*, 17 FCC Rcd at 19979 & 19981, ¶¶ 46 & 51.

[229] *See, e g*, Verizon Comments at 10; Vodafone Comments at 15; Vodafone Reply at 11; C&W Comments at 25; AHCIET Comments at 12; NTT DoCoMo Comments at 3-6; Orange SA Comments at 1; KDDI Reply at 3, 5 (arguing that the Commission should focus not on foreign mobile termination rates but rather on foreign mobile surcharges that U.S. carriers charge their customers and whether they accurately reflect recent reductions in foreign mobile terminations rates). *See also* Letter from Marco De Benedetti, Chief Executive Officer, Telecom Italia Group to Marlene Dortch, Secretary, FCC, IB Docket 02-324 & 96-261 at 3 (dated Mar. 2, 2004) (Telecom Italia Mar 2, 2004 *Ex Parte* Letter). Letter from Leslie J. Martinkovics, Director, International Regulatory Affairs, Verizon to Marlene Dortch, Secretary, FCC, IB Docket 02-324 & 96-261, Annex A (dated Mar. 2, 2004) (Verizon Mar. 2, 2004 *Ex Parte* Letter).

[230] *See, e g*, AT&T Comments at 30; CompTel Comments at 1; PCCW Comments at 2; MCI Comments at 24 (all supporting the application of existing benchmarks to foreign mobile termination rates); *see also* Vodafone Comments at 14, Vodafone Reply at 3-4, Verizon Comments at 9-10; Verizon Reply at 6-7; NTT DoCoMo Comments at 11-12; GSM Europe Comments at 2, 6-7, Orange SA Comments at 1, 5; Telefonica Comments 7-8; Telecom Italia Comments at 7-8; BellSouth Reply at 3-4; KPN Reply at 8; Letter from Diane Cornell, Counsel, Cellular Telecommunications & Internet Association to Marlene Dortch, Secretary, FCC, IB Docket 02-324 & 96-261 at 1 (dated Nov. 25, 2003) (CTIA Nov. 25, 2003 *Ex Parte* Letter) Letter from Barbara Phillips, Vice President Public Policy, Vodafone Americas Inc. to Marlene Dortch, Secretary, FCC, IB Docket 02-324 & 96-261 at 1-3 (dated Mar. 3, 2004) (Vodafone Mar. 3, 2004 *Ex Parte* Letter) (all opposing to the application of the *Benchmarks Policy* to foreign mobile termination rates).

[231] *See, e g*, Vodafone Reply at 9; AT&T Wireless Reply at 3-5 (arguing that introduction of benchmarks for foreign mobile termination rates by the Commission would conflict with the rule of international comity).

[232] *See, e g*, Verizon Comments at 9-10; Verizon Reply at 5, 7-8; Sprint Comments at 19; Vodafone Comments at 9-10, C&W Comments at 20-21, 26; EC Comments at 3; GSM Europe Comments at 8; Government of Japan Reply at 1-2; NTT DoCoMo Reply at 9; ANIEL Comments at 4-6; BellSouth Reply at 2; KDDI Reply at 4-5; KPN Reply at 3-5; PCCW Reply at 3; T-Mobile Reply at 2, 5-6; Vodafone Reply, Annex B. *See also* AHCIET Comments at 12; ETNO Comments at 1-2; Verizon Comments at 9-10; Orbitel Reply at 4; EC Reply at 3-4; AT&T Wireless Reply at 3, 9; KPN Reply at 10; CTIA Nov. 25, 2003 *Ex Parte* Letter at 1-2 (arguing that the Commission should defer to relevant national and multilateral organizations).

[233] *See, e.g*, Verizon Comments at 10; Vodafone Comments at 15; C&W Comments at 25; AHCIET Comments at 11-12; Orbitel Reply at 4, KPN Reply at 10; T-Mobile Reply at 2-5 (acknowledging the Commission's consumer alert regarding foreign mobile termination rates and encouraging the Commission to increase its efforts in educating consumers about foreign mobile termination surcharges).

excessively high and not based on costs.[234] One commenter has alleged that, in many cases, mobile surcharges in excess of $0.07-$0.10 per minute are significantly above the cost of interconnection.[235] As we have noted, regulators in various countries are considering the issue of high mobile termination rates.[236] We remain however, very concerned about the possibility that U.S customers might be paying rates that are unreasonably high or discriminatory. To ensure that we fully understand the magnitude of this problem and to properly evaluate the appropriate actions we can take, we commit to initiate a Notice of Inquiry, within six months of the effective date of this Order, seeking input on the status of foreign mobile termination rates, actions taken by foreign regulators, and the impact of these rates and actions on U.S. competition and U.S. consumers. We do not, by this direction, foreclose U.S. carriers and parties from making appropriate filing with the Commission on this issue as is their right under our rules.[237] We believe that the information received from our Notice of Inquiry, along with any petitions or filings that are made, will provide a basis for the Commission to best address the issue of mobile termination rates from a global perspective to ensure that U.S. rate payers are not paying unreasonably high rates.

91. We believe that where rates for foreign mobile termination applied to U.S.-international traffic are excessively high, they should move towards cost and agree with NTIA that the Commission should "demonstrate U.S. commitment and leadership to achieving lower prices for consumers worldwide."[238] The Commission's long-standing goals regarding rates for termination of international communications apply to foreign mobile termination rates. As we found with regard to fixed rates, policies based on these goals act to ensure the public interest benefits of more efficient competition and more cost-based calling rates to U.S. customers. Accordingly, consistent with our broad authority to protect U.S. consumers from harms resulting form anti-competitive behavior, the Commission will respond to petitions and notifications when addressing anti-competitive harms, including rates not based on costs, with regard to mobile termination rates on individual routes. Relying on a case-by-case approach by which U.S. carriers and other parties may seek relief from anti-competitive conduct on a U.S.-international route permits us to take into account the differences in the state of competition and particular

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234 AT&T Comments at 31-33; Sprint Comments at 18; MCI Comments at 18-20; CompTel Comments at 1-4; AT&T Reply at 21; MCI Reply at 20 NTIA recognizes that "in some circumstances, there may be higher costs for terminating a call on a mobile network as opposed to a fixed network .. [but] high mobile termination charges, often far above applicable fixed traffic rates, are currently being levied in some foreign markets." NTIA Aug 5, 2003 *Ex Parte* Letter at 3.

235 AT&T Feb 5, 2004 *Ex Parte* Letter at 1, 18. *see also* Letter from James Talbot, Counsel, AT&T to Marlene Dortch, Secretary, FCC, IB Docket 02-324 & 96-261 at 3-4 (dated Feb. 18, 2004) (AT&T Feb. 18, 2004 *Ex Parte* Letter).

236 *See* Letter from Erkki Liikanen, Member, European Commission, to Michael Powell, Chairman, FCC, IB Docket 02-324 & 96-261 at 1-2 (dated Mar. 4, 2004) (EC Mar. 4, 2004 *Ex Parte* Letter); Letter from Stephen Timms, MP, Department of Trade and Industry, United Kingdom, to David Gross, Ambassador, United States Department of State, submitted in IB Docket 02-324 & 96-261 at 1-2 (dated March 3, 2004) (UK Department of Trade and Industry Mar. 3, 2004 *Ex Parte* Letter); Letter from Anette C. Bordes, Director, Legal and Regulatory, KPN Mobile N.V. to Marlene Dortch, Secretary, FCC, IB Docket 02-324 & 96-261 at 1-2 (dated Mar. 4, 2004) (KPN Mar. 4, 2004 *Ex Parte* Letter), Letter from Cheryl A. Tritt, Counsel, T-Mobile USA to Marlene Dortch, Secretary, FCC, IB Docket 02-324 & 96-261 at 2 (dated Feb. 2, 2004) (T-Mobile Feb 2, 2004 *Ex Parte* Letter).

237 *See* 47 C.F.R. § 1.401.

238 NTIA Aug. 5, 2003 *Ex Parte* Letter at 3.

facts on each route. We believe that by having in place a complaint mechanism, U.S. consumers will be protected from paying unreasonably high mobile termination rates.

VII. CONCLUSION

92. Upon consideration of the record before us, we find for the reasons discussed above that the public interest is served by reforming the Commission's longstanding ISP policy. We remove the ISP from benchmark-compliant routes and modify current contract filing requirements with respect to non-ISP routes. Furthermore, in view of our action removing the ISP from benchmark-compliant routes, we eliminate the Commission's ISR policy and associated filing requirements. We also adopt certain regulatory safeguards to protect U.S. customers from anticompetitive conduct should it occur in the future. We retain our current benchmarks policy subject to further evaluation as to whether future modifications are warranted. In addition, in order to ensure that we can properly evaluate appropriate actions for the Commission to undertake on the issue of foreign mobile termination rates, we commit to issuing a Notice of Inquiry. Finally, we amend the Commission's rules to reflect and implement the actions we are taking in this proceeding.

VIII. ADMINISTRATIVE MATTERS

A. Final Regulatory Flexibility Certification

93. The Regulatory Flexibility Act of 1980, as amended (RFA),[239] requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[240] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[241] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[242] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). An Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM*.[243] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA.

94. The U.S.-international market has been undergoing changes in recent years. There has been increasing competition on many U.S.-international routes accompanied by lower

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239 The RFA, *see* 5 U.S.C §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Pub. L No. 104-121, Title II 110 Stat. 847 (1966).

240 5 U S.C § 605(b).

241 5 U.S C. § 601(6)

242 5 U S.C § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C § 632). Pursuant to 5 U.S C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

243 *See NPRM*, 17 FCC Rcd at 19982 & 19986-89, ¶¶ 53 & 68-78.

settlement rates and calling prices to U.S. customers. There also exists the potential for further development of competition as a result of emerging means of routing international traffic that do not involve the traditional carrier settlement process. At the same time, settlement rates on most routes continue to be above cost and there exists the continued potential for anticompetitive conduct and other forms of market failure. On balance, the Commission finds that the changes now unfolding in the U.S.-international market permits it to adopt a more limited application of our regulatory framework accompanied by competitive safeguards to protect U.S. customers against anticompetitive behavior. The Commission continues to believe that, where there is vigorous competition, market forces are causing international termination rates to move toward cost on many routes. It concludes that reforming its rules to remove the International Settlements Policy (ISP) from benchmark-compliant routes will give U.S. carriers greater flexibility to negotiate arrangements with foreign carriers. The Commission believes that doing so will encourage market-based arrangements between U.S. and foreign carriers that will further its long-standing policy goals of greater competition in the U.S.-international market and more cost-based rates for U.S. customers. The Commission has decided to retain the benchmarks policy subject to evaluation as to future modifications. It similarly will continue to evaluate the nature and effect of high foreign mobile termination rates on U.S. customers. It concludes that the record before us regarding future benchmarks policy and on foreign mobile termination rates is insufficient to warrant specific Commission action at this time.

95. The Order requires that the ISP be removed from all U.S.-international routes that are benchmark-compliant and affirms, adopts, or modifies certain competitive safeguards to prevent potential anticompetitive harm on such routes. The rules and policies contained in the Order apply to all carriers providing facilities-based international common carrier service pursuant to Section 214 of the Act. It is uncertain as to the number of small entities that will be affected by the proposals. Agency data indicate there has been a steady increase in the number of Section 214 applications filed with the Commission. The total number of licensees is difficult to determine, because many licenses are jointly held by several licensees. Based on agency data, it appears that there could be 800 applicants that might be a small entity.

96. The Order will reduce the administrative burden on all carriers, both small and large, of complying with the ISP and contract and accounting rate filing costs. The Order reduces the filing of carrier-to-carrier contracts contained in Section 43.51. The Order clarifies that Section 43.51 applies solely to U.S. carrier contracts for international common carrier service involving dominant foreign carriers on routes where the ISP applies. The Commission narrows the contract filing requirement and clarifies that rate filings need not be made for routes removed from the ISP. These modified filing requirements will eliminate many current-required contract filings and rate filings currently made by all U.S.-international facilities-based carriers, including small entities, in the normal course of business; and therefore, do not impose a significant economic impact on these small entities.

97. No commenters addressed the issue of the RFA.

98. The Commission tentatively concluded in the IRFA that its proposals were the least burdensome alternatives on all entities, including small entities. The Commission sought comment on those tentative conclusions.[244] In this Order, we adopt one of the proposals set forth

[244] *See NPRM*, 17 FCC Rcd at 19982, ¶ 53.

in the *NPRM* and determine that removing the ISP from additional U.S.-international routes will give U.S.-international facilities-based carriers the flexibility necessary to respond to dynamic price and service changes in the marketplace and will best protect U.S. customers from the rates, terms and conditions that violate the Communications Act.[245]

99. Therefore, we certify that none of the requirements of the Order will have a significant economic impact on a substantial number of small entities.

100. **Report to Congress:** The Commission will send a copy of the Order, including a copy of the Final Regulatory Flexibility Certification, in a report to Congress.[246] In addition, the Commission will send a copy of the Order, including a copy of the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and Final Regulatory Flexibility Certification will also be published in the Federal Register.[247]

B. Final Paperwork Reduction Act of 1995 Analysis

101. This Report and Order contains either new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collection contained in this proceeding.

102. All comments regarding the requests for approval of the information collection, both regular and emergency, should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to Judith-B.Herman@fcc.gov; phone 202-418-0214.

IX. ORDERING CLAUSES

103. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i)-4(j), 201-205, 214, 303(r), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-154(j), 201-205, 214, 303(r), 309, the policies, rules, and requirements discussed herein ARE ADOPTED and Parts 43 and 63 of the Commission's rules, 47 C.F.R. §§ 43, 63, ARE AMENDED as set forth in Appendix B.

104. IT IS FURTHER ORDERED that the Commission's Consumer and Government Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

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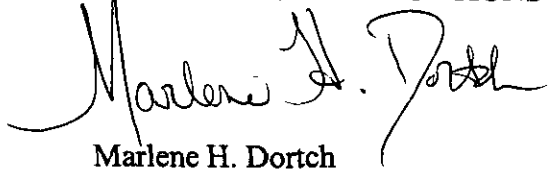
245 *See supra* § III.B, *see also* 47 U S.C. §§ 201, 202

246 *See* 5 U.S.C. § 801(a)(1)(A)

247 *See* 5 U S.C § 605(b).

105. IT IS FURTHER ORDERED that the policies, rules, and requirements established in this decision shall take effect thirty days after publication in the Federal Register or in accordance with the requirements of 5 U.S.C. § 801(a)(3) and 44 U.S.C. § 3507.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary